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No. 91-686

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

JOHNNY ALLEN ASHLEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a case controlled by *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675 (1988) and *Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486 (1990), whether certiorari should be granted to review a decision of the Supreme Court of Georgia holding that: (1) the Respondent made an unequivocal request for counsel during a custodial interview; and (2) the state did not prove that the Respondent initiated the post-request contacts with law enforcement officials which resulted in the giving of a statement.

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STATEMENT OF CASE

Respondent was arrested on May 8, 1989 on two sets of charges: (1) a murder charge which arose from an incident in Clarke County, Georgia; and (2) DUI and drug possession charges which arose in Barrow County, Georgia where the Respondent lived. At all times pertinent to this case, Respondent was in the custody of the Barrow County Sheriff's Department. The law enforcement officials of Clarke and Barrow counties acted jointly in the murder investigation and then in the arrest and interrogation of the Respondent following his arrest.

There has never been any dispute in this case that the Respondent unequivocally asserted his right to counsel in

response to an attempt to interview him during the early evening hours of May 9, 1989. When Respondent made the request for counsel, he was being interviewed by the Clarke County police who testified that Officer Kenney of the Barrow County Sheriff's Department was present and heard the request for counsel. This testimony was substantiated by the interview notes retained by one of the Clarke County officers.[1] The details about what happened next are:

1. Immediately after the Clarke County police officers departed the Barrow County jail where they had futilely attempted to interview Respondent, Kenney returned to the interview room and began to question Respondent further. The only change was a shift in the inquiry from the murder to the drug charge which was a Barrow County offense.

2. During the course of Kenney's conversation with Respondent, Kenney tried to steer the subject back to the murder. Respondent eventually broke off the discussion and said he wanted to "sleep on it" for a while.

3. The next day, May 10, 1989, Respondent was twice taken from his jail cell and brought to Kenney's

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[1] Officer Kenney admitted being present during portions of this interview but insisted that he never actually heard Ashley invoke his right to counsel. Kennedy's claim of ignorance, of course, is irrelevant to the resolution of the issue in this case. *Arizona v. Roberson*, 486 U.S. 675 (1988) (held that rule of *Edwards v. Arizona*, 451 U.S. 477 (1981) applies even when interrogation following the invocation of the right to counsel concerns a criminal matter unrelated to the initial interview and the later interviewer is ignorant of the suspect's prior request for legal assistance.)

office for a continuation of the prior evening's discussion. Respondent denied that he asked to talk to Kenney on either occasion. Kenney claimed that one of the jailers said the Respondent wanted to speak with him. Kenney, however, could not recall the name of the jailer who supposedly relayed this request and the jailer could not otherwise be identified. In addition, Kenney never asked the Respondent if he, in fact, made such a request. During the course of the second of these two meetings on May 10, 1989, Respondent agreed to talk with the Clarke County police once again and as a result made the statement that was the primary object of Respondent's motion to suppress in the trial court.

This case was argued to the Supreme Court of Georgia as a straight forward application of *Edwards v. Arizona*, 451 U.S. 477 (1981), *Arizona v. Roberson*, 486 U.S. 675 (1986), and *Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486 (1990). The argument had two components. First, Respondent argued that Kenney's interrogation on the evening of May 9, 1989 was a continuation of the interview that Respondent had attempted to conclude by invoking his right to counsel. In that light, the state's attempt to portray Kenney's interview as a separate interview which Respondent "initiated" was both contrary to fact and legally beside the point.[2] Second, the two interviews between Kenney and Respondent on May 10, 1991

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[2] Bear in mind here that the only break in the interview process on the evening of May 9, 1989 was a brief conference in the hallway outside the interview room *immediately after* Respondent told the Clarke County officers he wanted an attorney. When the conference broke up, Kenney walked back into the interview room and resumed the questioning of Respondent.

were not proven to have been at the initiative of the Respondent. In this vein, Respondent argued that under Georgia law, the hearsay rule applies to certain non-jury proceedings and ought to apply to *Jackson-Denno* hearings. For that reason, Kenney's testimony about what the unidentified jailer said was both incompetent and inadmissible to prove that Respondent initiated the May 10, 1989 meetings. Three Georgia hearsay decisions were cited in Respondent's brief to the Supreme Court of Georgia, the most notable of which was *Barnett v. State*, 194 Ga. App. 892, 392 S.E.2d 322 (1990), a case finding Georgia's hearsay rule applicable to probation revocation hearings. *See also, Mills v. Bing*, 181 Ga. App. 475, 352 S.E.2d 798 (1987); *Collins v. State*, 146 Ga. App. 857, 247 S.E.2d 602 (1978).

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

This case involved an uncomplicated application of the *Edwards, Roberson* and *Minnick* decisions to a largely undisputed set of facts. As far as the Kenney interview on the evening of May 9, 1989 is concerned, the Georgia Supreme Court simply rejected the argument that Kenney's phase of the interrogation was separate from the phase conducted by the Clarke County police officers. The Court specifically rejected the contention that Respondent initiated further discussions about the case (after having invoked his right to counsel) when he asked what the charges against him were. The Court specifically rejected the argument that by walking in and out of the

interrogation room, Kenney somehow changed the context of what was an ongoing interrogation process with only the identity of the interrogators changing.

The Georgia Supreme Court's opinion is highly fact specific and reflects a serious attempt to abide by the applicable rulings of this Court in *Edwards, Roberson* and *Minnick*. Petitioner has not shown the opinion to be in conflict with any precedent on the books in any jurisdiction – state or federal. Nor does it seem that Petitioner has made a plausible argument that the Georgia Supreme Court in fact misapplied *Edwards, Roberson* or *Minnick* despite its clear cut desire to be faithful to their command. The petition therefore does not meet the threshold guidelines to be seriously considered for certiorari review under Rule 10 of this Court's rules.

Apart from this, the Georgia Supreme Court's ruling concerning the May 10, 1989 interviews between Kenney and Respondent rested on an independent state ground – the Georgia hearsay rule. Recognizing that the state had to show that Respondent initiated those interviews, the Court found that the state had failed entirely to meet that burden. The only evidence in the record was Kenney's claim about what the unknown and unidentified jailer had told him concerning Respondent's desire to speak. Respondent denied asking for the meetings and Kenney acknowledged that he never bothered to confirm the request with Respondent when Respondent was brought into his office each time.

It is clear under this Court's independent and adequate state ground decisions that Georgia is free to apply its hearsay rule in *Jackson-Denno* hearings even though

other states and the federal courts might not choose to follow suit. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2553-55 (1991). The Petitioner does not argue and nothing in the development of the Georgia hearsay rule suggests that its application to this case was based on the belief that federal law dictated its application. Because Georgia treats hearsay that falls outside one of the established hearsay exceptions as both inadmissible and *incompetent*, such hearsay even if erroneously admitted is not entitled to any probative weight. *Collins v. State*, 146 Ga. App. 857, 247 S.E.2d 602 (1978). Under this rationale, the hearsay rule is applicable to non-jury proceedings in Georgia at least when the question of evidentiary sufficiency is raised. In this case, the Georgia Supreme Court made it clear that *Jackson-Denno* hearings fall within this rationale. Accordingly, the Court found that the state had offered no competent evidence to support its claim that Respondent initiated the conversations with Kenney on May 10, 1989.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted

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